DOCKET FILE COPY ORIGINAL

RECEIVED

JAN 11 1996

FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services	)))	**GEN Docket No. 90-314 RM-7140, RM-7175, RM-7618**

OPPOSITION TO PETITION OF CINCINNATI BELL TELEPHONE COMPANY TO IMPLEMENT MANDATE OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AT&T Wireless PCS Inc. ("AT&T") hereby opposes the above-captioned petition of Cincinnati Bell Telephone Company ("CBT"), which seeks revision of the FCC's cellular attribution rule, a moratorium on further construction and exercise of PCS licenses in the Cincinnati MTA, and ultimately the revocation and reassignment of the A and B block licenses.[1/] CBT's petition is procedurally defective and misconstrues the nature of the relief afforded by the United States Court of Appeals for the Sixth Circuit in Cincinnati Bell Telephone Co. v. FCC.[2/] In any event, grant of CBT's petition would be contrary to the public interest. It should be dismissed or denied promptly.

I. CBT's Petition is Procedurally Defective

While CBT captions its pleading as a petition to implement the Sixth Circuit's mandate, the entire substance consists of an attack on the FCC's decision to license the A and B PCS spectrum

---

[1/] AT&T holds the A block PCS license in Cincinnati and GTE Macro Communications Corporation holds the B block license.

[2/] Cincinnati Bell Telephone Co. v. FCC, Nos. 94-3701/4113; 95-3023/3238/3315 (6th Cir. Nov. 9, 1995).

blocks. As such, CBT's petition constitutes an untimely petition to deny the applications of the A and B block winners.

The deadline for petitions to deny the A and B block applications was May 12, 1995. While several parties filed petitions on that date, CBT was not among them. Its petition to revoke the MTA authorizations now, after the auction participants have collectively paid almost $8 billion for the licenses in addition to the costs associated with constructing, clearing microwave licensees, and marketing over the past six months, is grossly out of time. Given this procedural infirmity, grant of CBT's petition would be unlawful, as well as manifestly unjust.

Even if CBT's petition was timely filed, the petitioner has no standing to challenge the grant of the A and B block licenses. To establish standing, "petitioners must allege facts sufficient to demonstrate that grant of the subject application would cause them to suffer a direct injury."[3/] In addition, "petitioners must demonstrate a causal link 'between the claimed injury and the challenged action'" by establishing that "(1) 'these injuries fairly can be traced to the challenged action;' and (2) 'the injury would be prevented or redressed by the relief requested.'"[4/]

CBT has not demonstrated an "injury in fact" that is fairly traceable to the grant of the challenged licenses. It is pure

---

[3/] Applications of Wireless Co. L.P., et al. for Licenses to Provide Broadband PCS Service, Order, DA 95-1412, at ¶ 7, released June 23, 1995 (citations omitted) (Wireless Co. Order).

[4/] Id. (citations omitted).

speculation that CBT would have been the winner in the MTA auction if it had participated or that it would have a chance of purchasing the Cincinnati licenses in a reauction.[5/] This is especially the case if CBT's "single majority shareholder" standard is adopted and applied retroactively, as nearly all the original auction participants, including AT&T, as well as numerous other holders of minority cellular interests would be deemed "adversely affected by the old attribution rule"[6/] and thus eligible to apply. Given the additional parties able to participate, it is likely that auction prices for most markets, including Cincinnati, would be higher than those collected originally. As the Wireless Telecommunications Bureau recently found, "[a]n allegation of injury based on these hypothetical events is too remote and speculative to confer standing."[7/]

II. CBT Misreads the Sixth Circuit's Directive

On November 9, 1995, the Sixth Circuit Court of Appeals granted CBT's challenge to the FCC's attribution standard for purposes of the cellular/PCS cross-ownership rule, holding that the Commission had failed to give a reasoned explanation for declining to adopt a less restrictive measure.[8/] CBT now argues that the Court's mandate requires the FCC to adopt a revised

---

[5/] While CBT does not explicitly advocate a new auction, it is unclear what other reassignment scheme it expects the Commission to employ.

[6/] See CBT Petition at 5.

[7/] Wireless Co. Order at ¶ 8.

[8/] Cincinnati Bell at 13.

cellular attribution rule and then apply it retroactively to A and B block auction winners.

If the Court had expected the Commission to take the extreme action of recalling MTA licenses and somehow "establish[ing] a procedure by which those licenses . . . would be reassigned in accordance with proper eligibility rules,"[9/] it would have ordered exactly that. The Court made no such pronouncements.

Rather, the Sixth Circuit stated that the Commission had failed to provide an adequate explanation for its cellular attribution rule and, consequently, the Court remanded the case "for further proceedings on this issue."[10/] Pursuant to this judicial directive, the FCC could choose to retain its existing rule and provide a more reasoned basis for its decision or it could adopt an alternative standard, which may or may not provide CBT with the relief it seeks. There is nothing in the Court's ruling that would require the Commission to promulgate CBT's proffered single majority shareholder standard and, more importantly, there is absolutely no indication that the Commission is required to apply any revised rule retrospectively. Accordingly, CBT's attempt to cause revocation of AT&T's and the

---

[9/] CBT Petition at 4-5.

[10/] Cincinnati Bell at 13-14.

other A and B block providers' licenses must be rejected.[11/]

III. The Public Interest Favors Denial of CBT's Petition

Apart from the lack of any legal compulsion for the Commission to grant CBT's petition, there is absolutely no public interest basis either for staying AT&T's ability to use its Cincinnati license or for revoking and redistributing the A and B block authorizations.

As noted previously, the A and B block licensees paid $7.8 billion into the United States Treasury more than six months ago and have since been constructing their PCS systems and making other preparations to enter the market. These licensees are now poised to provide significant competition for incumbent wireless providers. Grant of CBT's petition would involve months, possibly years, of rulemakings and undoubtedly a new auction, delaying PCS entry indefinitely.

[11/] It also appears that adoption of CBT's proposed cross-ownership standard would not necessarily provide the company with the relief it seeks. While the Sixth Circuit concluded that the cellular/PCS cross-ownership rule was arbitrary, the Court explicitly declined to strike down the Commission's 45 MHz spectrum cap. See Cincinnati Bell at n.6; 47 C.F.R. § 20.6. See also In the Matter of Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, Order, at ¶ 3, released December 20, 1995 (Bureau emphasized that the 45 MHz limit was not the subject of the Sixth Circuit's remand and that "it is very unlikely that the Commission would . . . reexamine the merits of the 45 MHz spectrum cap"). Because CBT remains subject to the spectrum cap, with its separately adopted attribution standard, it would be ineligible for the reassignment of a 30 MHz PCS license in the Cincinnati MTA even if the Commission revised the attribution standard applicable to the cellular/PCS cross-ownership rule. See CBT Petition at 2 (one of CBT's affiliated entities owns more than a 20 percent interest in a cellular partnership, rendering "CBT ineligible for the 30 MHz licenses in the Cincinnati MTA").

Significantly, AT&T argued at the outset in favor of a less stringent attribution test and strenuously sought the opportunity to bid in markets where it had less than a controlling interest in cellular licensees. Nonetheless, AT&T does not find in the Sixth Circuit's order an obligation on the part of the FCC to revoke and reassign the A and B block licenses. Indeed, balancing the disruption to existing licensees, the enormous costs associated with holding a new auction, and the massive delay in the onset of PCS competition with the mere possibility that AT&T, CBT and others may win additional licenses in a reauction militates heavily against granting CBT's petition.

Conclusion

For the foregoing reasons, CBT's petition should be dismissed or denied.

Respectfully submitted,

AT&T Wireless PCS Inc.

Cathleen A. Massey / by SFS

Cathleen A. Massey
Vice President - External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
4th Floor
Washington, D.C. 20036
(202) 223-9222

January 11, 1996

CERTIFICATE OF SERVICE

I, Tanya Butler, do hereby certify that on this 11th day of January, 1996, I caused a copy of the foregoing Opposition to Petition of Cincinnati Bell Telephone Company to Implement Mandate of United States Court of Appeals for the Sixth Circuit to be sent by first class mail, postage prepaid, or to be delivered by messenger (*) to the following:

Michelle C. Farquhar *
Chief
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Kathleen Ham *
Chief, Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Rosalind K. Allen *
Associate Chief
Wireless Telecommunications Bureau
2025 M Street, N.W., Room 7002
Washington, D.C. 20554

Sue McNeil *
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5322
Washington, D.C. 20554

Lisa Warner *
Legal Branch
Commercial Wireless Division
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Thomas Taylor
Douglas E. Hart
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, Ohio 45202

Jackie Chorney *
Assistant Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

ITS *
2100 M Street, N.W.
Suite 140
Washington, D.C. 20037

Tanya Butler

47329.1